YALE LAW JOURNAL

Published monthly during the Academic Year by Yale Law Students
with Advice and Assistance from Members of Faculty

SUBSCRIPTION PRICE, $2.50 A YEAR SINGLE COPIES, 35 CENTS

Canadian subscription price is $3.00 a year; foreign, $3.25 a year.

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THE FORMATION OF A UNILATERAL CONTRACT

The important distinctions between unilateral and bilateral contracts are slowly coming to be recognized. The case of *Brackenbury v. Hodgkin* (1917, Me.) 102 Atl. 106 affords an excellent opportunity for setting forth some of these distinctions.[1] The exact words used by the parties are not given in the opinion, but the facts are reported by the court substantially as follows: The defendant wrote a letter to her son-in-law, the plaintiff, offering that if he would move from Missouri to Maine and would care for the defendant during her life, he should have the ownership of the home place after the defendant's death and the use of it during her life. The plaintiff moved as requested and cared for the defendant for a few weeks. Trouble ensued, caused, as the court finds, by the unreasonable demands and bad disposition of the defendant, whereupon she conveyed the premises

[1] Two other recent cases of unilateral contracts, involving the problem of *Shadwell v. Shadwell* (1860) 9 C. B. N. S. 159, are discussed at length in this number in an article at page 362.

to her son—a co-defendant. The plaintiff filed a bill in equity to compel a reconveyance from the son to his mother, to restrain the prosecution of a statutory ejectment suit brought by the son, and to obtain a decree that the mother should hold the land in trust for the plaintiff. The relief asked was granted in full.

The court says: "The offer was the basis, not of a bilateral contract, requiring a reciprocal promise, a promise for a promise, but of a unilateral contract requiring an act for a promise. . . . The plaintiff here accepted the offer by moving from Missouri to the mother's farm in Lewiston and entering upon the performance of the specified acts. . . . The existence of a completed and valid contract is clear."

In this case the defendant was the offeror, and by her letter she created in the plaintiff the power to form a contract between them by accepting.[2] What was this power and how was it to be exercised? The defendant has clearly offered to undertake the duty of allowing the plaintiff to enjoy the use of certain lands during her life and of conveying to him the fee therein at her death. Did she in return ask the plaintiff to promise to support her until her death? No such promise was asked for in express terms, nor was such a promise expressly made. Nevertheless, it would not be unreasonable to find an implication of such a promise both in the offer and in the acceptance. In such case, the contract would be bilateral, for each of the parties would be undertaking to perform certain acts in the future. The contract would include *mutual* rights and *mutual* duties. The act of the plaintiff in moving to Maine might have been understood by both parties as an expression of an intention to undertake the duty of supporting the defendant during her life; that is, this act would be a *promissory* act. If such was the fact, the decision is justifiable; for the contract was fully completed,—the requested promissory acceptance had been given, and the offeror had knowledge of it.

The court expressly holds, however, that the contract was unilateral. This means that the plaintiff was requested to make no promise, either by words or by other action. He undertook no duty for breach of which he would be bound to pay damages. He could have abandoned the place in Maine and ceased to support the defendant, without committing any breach of contract. Does it not follow from this that the defendant was not bound, either, and still had the power and privilege of revoking her offer?

Suppose the words of the defendant were as follows: "I promise to convey my land to you in return for your moving to Maine and caring for me *during my life.*" Such words as these indicate that the

[2] For a discussion of the whole subject of the formation of contract from the present writer's point of view, see Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations* (1917) 26 YALE LAW JOURNAL, 169.

power of the offeree can be exercised only by a long series of acts extending through the entire life of the defendant. Acceptance would not be complete, and the contract would not be formed, until the instant of the defendant's death.[3] Could not the defendant, therefore, at any time prior to her death and prior to complete acceptance, revoke her offer by giving notice to the plaintiff? In general, an offer is supposed to be revocable prior to acceptance. The present case indicates how very inequitable such a revocation might be.[4] A quasi-contractual action for *quantum meruit* would not do justice; for the defendant has received only a few weeks' support; and to recover the value of this would not compensate the plaintiff for breaking up his home in Missouri and moving to Maine. In many cases, a very simple remedy would be to hold that the plaintiff's power of acceptance is irrevocable after the plaintiff has done some substantial act in part performance of the requested acceptance. In the present case, however, the plaintiff is deprived of the *physical* power to accept, even though he may still have the *legal* power. Readiness to support is not the same as actual support and is not the specified acceptance.[5] Perhaps, the chief criticism of the suggested rule of irrevocability is that it operates with too great severity against the offeror.[6]

There is a third possible assumption in the present case. Suppose the defendant said: "I promise to convey my land to you *in return for* your moving to Maine, and *on condition* that you support me during my life." This, too, is an offer of a unilateral contract. The agreed equivalent for the defendant's promise is the plaintiff's action in

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[3] It might be questioned whether in such a case the formation of a contract is possible, for the reason that death would revoke the offer. Surely, however, no court would give weight to such a suggestion. Even if the offer is revocable (and it probably is not), the acceptance is complete, and the revocation by death does not take effect prior to the completion of the acceptance. If it be true that two living persons are necessary to make a contract, in this case there were two living persons during the entire period of formation. To adopt the opposite view would be worse than mediæval casuistry.

[4] It has been vigorously denied that the revocation is inequitable and as firmly asserted that no offer can be irrevocable. See I. Maurice Wormser, *The True Conception of Unilateral Contracts* (1916) 26 YALE LAW JOURNAL, 136, following Langdell, *Summary of the Law of Contracts* (1880) secs. 4, 178. In support of the text above, see the article cited in note 2, *supra*.

[5] It appears to be the opinion of the New York Court of Appeals in *DeCicco v. Schweizer* (1917, N. Y.) 117 N. E. 807, that the requested act must be completed before a contract results. "Until marriage occurred the defendant was not bound. It would not have been enough that the count remained willing to marry." Similarly, a part performance with readiness to complete was held insufficient in *Pain v. Bastwick* (1621) Cro. Jac. 583. Yet in the present case the court seems to think it enough that the plaintiff "remained willing" to support the defendant during her life.

[6] Such severity could be avoided as suggested in 27 YALE LAW JOURNAL, pp. 195, 196.

moving to Maine.[7] The support of the defendant during her life is a condition precedent to the plaintiff's right to an immediate conveyance. The supposed "contract" is formed upon the plaintiff's arrival in Maine, and thereafter it is too late for the defendant to revoke her offer. It is probable that this was the view that was actually held by the court. In this view the acts of moving to Maine operate to create new legal relations called contract. These relations would include the right not to be disturbed in possession of the home place, the privilege of occupying that place, and the legal power to create a right to the fee by supporting the defendant during her life. These relations were all irrevocable by the defendant. As a correlative to the plaintiff's conditional right to the fee, there would be the conditional duty of the defendant to cause such acts to be done as will convey the fee. The acts of the plaintiff in supporting the defendant for life are facts subsequent to the formation of the contract (the preceding relations), and precedent to the plaintiff's right to an immediate conveyance of the fee.

In cases of this sort, the parties may not be at all clear in their own minds as to the legal relations that they desire to create; and the court must determine the legal relations, not because the parties clearly assented to them but because they willed to do certain acts that ought to result in such legal relations.[8] If the court holds that the legal relations are as above, the remedy in the present case was a proper one. The decree is one for specific reparation and specific performance. The defendant is ordered not to disturb the plaintiff's possession; also to hold the fee in trust for the plaintiff. Whether or not the plaintiff will ever be entitled to a conveyance of the fee is a question yet to be determined. His right to such a conveyance is conditional upon support of the defendant during the rest of her life. It does not seem probable that the plaintiff will be able to fulfil this condition after the litigation and ill-will between him and the defendant. Of course, it will be the defendant who is causing the non-fulfillment of this condition; but a court of equity would hardly compel her to continue to live with the plaintiff. She has *perhaps* promised by *implication* that she would not prevent the plaintiff from fulfilling the conditions; but even if her conduct is a breach of this

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[7] In this case, also, the problem just discussed above is involved; for the defendant might telegraph her revocation after the plaintiff had sold his home and started for Maine. If the defendant had sent such a telegram the court would no doubt have pushed the moment of acceptance still further back. In *Martin v. Meles* (1901) 179 Mass. 114, 60 N. E. 397 Mr. Justice Holmes said: "If necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendant's obligation."

[8] Perhaps this is a further step in the development away from *contract* back to *status*. *Cf.* Nathan Isaacs, *The Standardizing of Contracts* (1917) 27 YALE LAW JOURNAL, 34.

implied promise or is tortious, it does not follow that the plaintiff should get the entire compensation without rendering any of the service. This is a separate problem. It may be, however, that the present decree will eventually result in the plaintiff's obtaining the fee, on the theory of constructive service and on the ground that the defendant has waived the condition by preventing its fulfillment.

A. L. C.

"GOING VALUE" FOR PURPOSES OF RATE REGULATION

A recent California case raises in an interesting form the much disputed question, when or to what extent "going value" is value upon which a public utility is entitled to base its rates. *San Joaquin Light & Power Corp. v. Railroad Commission* (1917, Cal.) 165 Pac. 16. It is generally admitted that "going value" is, to some extent at least, an item of value for rate purposes,[1] but there is much confusion with respect to the questions when and to what extent it constitutes such value.[2] In the latest ruling on the subject by the United States Supreme Court[3] it was held that "going value" is "a property right and should be considered in determining the value of the property upon which the owner has a right to make a fair return." This holding, it seemed at first, had practically settled the whole conflict; for, inasmuch as the Supreme Court is, under the Constitution, the court of last resort upon the question of valuation for rate-making purposes,[4] it was to be supposed that other tribunals would follow the Supreme Court upon this question. On the contrary, however, there has been a tendency on the part of many authorities to construe away the apparent effect of the Supreme Court's decision.

A striking illustration of this tendency is the California case above cited. In that case the court affirmed the decision of a commission[5] in which, it seems, no allowance whatever was made for "going

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[1] *Des Moines Gas Co. v. City of Des Moines* (1915) 238 U. S. 153; *People v. Wilcox* (1914) 210 N. Y. 479, 104 N. E. 911; *Public Service Gas Co. v. Board of Commissioners* (1913, Sup. Ct.) 89 N. J. L. 463, 87 Atl. 651. See Beale & Wyman, *Railroad Rate Regulation* (2d ed.) secs. 276, 280.

[2] *Hermann v. Newtown Gas Co.* (1916, N. Y. P. S. C., 1st Dist.) P. U. R. 1916 D, 825; *People v. Wilcox, supra; Rich v. Biddeford, etc. Co.* (1917, Me. P. U. C.) P. U. R. 1917 C, 982; *Appleton Waterworks Co. v. Railroad Commission* (1913) 154 Wis. 121, 142 N. W. 476; *Re Clarksburg Light & Heat Co.* (1916, W. Va. P. S. C.) P. U. R., 1917 A, 577; *East Bakersfield, etc. Association v. San Joaquin etc. Corporation* (1916, Cal. R. C.) P. U. R. 1916 C, 380 (the principal case before the Commission); and numerous other cases. See Whitten, *Valuation of Public Service Corporations*, secs. 550-644.

[3] *Des Moines Gas Co. v. City of Des Moines, supra.*

[4] *Public Service Gas Co. v. Board of Commissioners, supra.*

[5] *East Bakersfield, etc. Association v. San Joaquin, etc. Corporation, supra.*

value."[6] The reason assigned for the exclusion is that the utility's excessive earnings had been sufficient to offset all past deficits. As the opinion expressly purports to follow the above mentioned Supreme Court decision, the question thus raised by the case is reduced to this: May "going value" under the Supreme Court doctrine be wiped out by subsequent earnings?

The passage in the Supreme Court's opinion, upon which the recent cases rely, is as follows:

"Included in going value as usually reckoned is the investment necessary to organizing and establishing the business, which is not embraced in the value of its actual physical property. . . . For aught that appears in this record these expenses ["overhead charges"] may have been already compensated in rates charged and collected under former ordinances . . . and it is not to be presumed, without proof, that a company is under the necessity of making up losses and expenditures incidental to the experimental stage of the business."[7]

These cases, however, fail to notice that the Supreme Court, notwithstanding its language, did not exclude these expenses. In fact the above-quoted passage is only a *dictum,* for the point was not squarely before the court. Besides, the court, by negative inference, ultimately approved the allowance of these expenses.

Can the doctrine of these cases, then, be supported upon principle? In order to answer this question it will first be necessary to determine definitely just what "going value" is, for it seems that the whole conflict and confusion on the subject is due fundamentally to a confused conception of the nature of the thing in question. What, then, is "going value?" As was pointed out in one of the latest cases, "experts, courts and commissions" do not agree as to what this "elusive, intangible and troublesome" thing is.[8] The United States Supreme Court, however, has supplied a definition which sufficiently expresses the general principle involved. "Going value" that court defines as "the value which inheres in a plant where its business is

[6] The language of the commission is somewhat ambiguous, but both the court and the commission expressly purport to follow the above mentioned decision of the United States Supreme Court, and the Commission expressly states that the development cost has been wiped out by later earnings and that the United States "Supreme Court clearly intimates that if the expense of organizing and establishing the business has already been made good to the utility out of later rates no additional allowance for 'going concern value' may properly be made in a rate case." At any rate both the court and the Commission excluded the whole "item of development cost," estimated, by the deficit method, at $1,651,021.

[7] *Des Moines Gas Co. v. City of Des Moines, supra,* at p. 165.

[8] *Re Indianapolis Water Co.* (1917, Ind. P. S. C.) P. U. R. 1917 E, 556. A very illuminating and thorough discussion of the subject is contained in the report of Hon. H. M. Wright, Master in Chancery, in *Spring Valley Water Co. v. City & County of San Francisco,* now pending in U. S. Dist. Ct. N. D. Cal.

established, as distinguished from one which has yet to establish its business."[9] "Going value," then, is the difference between the value of a plant considered as a whole in its present condition and the sum of the values of the various component parts of the plant, considered as a "non-going" or static plant with its business and operating system yet to establish. It is indisputable that this added element is a thing of value; but just what does this value represent? It is, apart from "good will," the present representative of the time and effort spent in transforming the static "bare bones" of the plant into the present "going" concern. It is clear, then, that the utility must in some way be compensated for this expenditure. It is settled, however, that "good-will" value, though a part of "going value" as above defined, is not value for purposes of rate regulation.[10] The ultimate question, then, is whether *this remaining part of "going value"* may be offset by subsequent earnings.

In the first place it is clear that this "going-concern" element, when once it is created, is a continuous instrument of production, *i. e.*, it continues from year to year a permanent item of value which, without further outlay, brings in its annual return. Hence, *this part of the "going value,"* possessing, as it does, the distinguishing characteristic of capital expenditure, constitutes a part of the capital value of the plant. In the second place, the doctrine of these recent cases allows this *capital value to be wiped out by subsequent earnings.* But if this capital value may be wiped out by later earnings, then by the same reasoning all items of capital value may be wiped out by later earnings, and, therefore, if a utility is allowed to charge sufficient excessive rates the plant's total capital value would be wiped out, and the utility would have to serve the public gratuitously—an absurd conclusion which would seem to establish the fallacy of the doctrine.[11] It would seem, therefore, that the above mentioned part of "going value" is always value for purposes of rate regulation, and that cases which make "going value" depend in whole or in part upon the existence of past deficits, or allow "going value" to be offset by subsequent earnings, proceed upon an erroneous theory as to the fundamental nature of this item of value.

T. P. H.

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[9] *Des Moines Gas Co. v. City of Des Moines, supra,* at p. 165.

[10] *Willcox v. Consolidated Gas Co.* (1909) 212 U. S. 19. See Wyman, *Public Service Corporations* (2d ed.) sec. 1102.

[11] That past rates and earnings, though excessive, may not be considered in fixing present rates, see *Kindell v. Adams Express Co.* (1908) 13 I. C. C. 475, 490; *Bluefield v. Bluefield Waterworks, etc. Co.* (1917, W. Va. P. S. C.) P. U. R. 1917 E, 22, 32. See also Beale & Wyman, *Railroad Rate Regulation* (2d ed.) sec. 271.

CONSTRUCTIVE TRUSTS ARISING FROM BREACH OF EXPRESS ORAL TRUSTS OF LAND

A recent Washington case raises the troublesome question of the rights of proposed beneficiaries under an oral trust of land. A husband by will left real estate to his wife. At the time of the execution of the will it was orally agreed that the wife, if she survived the husband, should have the use of the property for her life, holding it intact until her death, at which time it should be divided equally among their children. The wife conveyed the property to one of the children. It was held that the other child had no enforceable interest in the property. *Brown v. Kausche* (1917, Wash.) 167 Pac. 1075.

In reaching this decision the court professed to follow the settled law of Washington, relying upon prior cases in which it had been held that there was no enforceable trust where land was conveyed by absolute deed but upon an oral agreement by the grantee to reconvey to the grantor. In order to determine whether the decisions relied upon by the Washington court were really in point, it is necessary to distinguish more carefully than the court did between different types of cases. They may be grouped under three general heads: (1) transfers *inter vivos* on oral trusts for the grantor; (2) transfers *inter vivos* on oral trusts for others than the grantor; (3) gifts by will.

In the first of these groups the authorities in the United States, with hardly a dissenting voice, refuse to recognize that the grantor has an enforceable interest in the property.[1] On the other hand, the modern English rule recognizes a "constructive" trust, based upon the principle that one who refuses to perform an express oral agreement must restore either what he received or its value.[2] In some cases the result is, of course, to require the grantee to do exactly what he orally agreed to do. This coincidence need not blind us to the real basis for the decision, any more than when the action is brought at law on a quasi-contract where an express oral contract within the statute of frauds has been broken by the defendant after performance by the plaintiff.[3] It seems clear that the American courts are

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[1] *Titcomb v. Morrill* (1865, Mass.) 10 Allen, 15. For numerous cases in accord, see the note in 39 L. R. A. (N. S.) 906. In at least one jurisdiction the grantor is permitted to recover the value of the land at law. *Cromwell v. Norton* (1906) 193 Mass. 291.

[2] *Davies v. Otty* (1865) 35 Beav. 208; *Haigh v. Kaye* (1872) L. R. 7 Ch. App. 469; *In re Duke of Marlborough* [1894] 2 Ch. 133. There is a tendency in a few American jurisdictions to adopt the English rule. See *Taylor v. Morris* (1912) 163 Cal. 717, 127 Pac. 66; *Bowler v. Curler* (1891) 21 Nev. 158, 26 Pac. 226; and other cases cited in 12 MICH. L. REV. 527, note 64. In many cases, however, the court relies on a "special confidential relation."

[3] For citation of authorities, see Woodward, *The Law of Quasi-Contracts*, Chap. VI.

guilty of failing to recognize what is after all a very simple application of ordinary equitable principles, obviously being misled by the coincidence referred to. The almost universally recognized rule that an absolute deed may be shown by extrinsic evidence to have been given to secure the payment of money seems to be based upon a more or less unconscious recognition of the same equitable principle.[4]

In the second and third groups of cases, however, a different problem is presented, since the trust is for persons other than the grantor or testator. Granting that the express oral trust is unenforceable, does the principle applied in the first group of cases enable us to impose a "constructive" trust obligation upon the grantee or devisee in favor of the proposed beneficiary? So far as the authorities go, this question is usually answered in the negative for the second group[5] and in the affirmative for the third.[6] If all that we have is a failure to keep an express oral agreement to hold in trust for third persons, it seems difficult to find any basis for raising a "constructive" trust on behalf of the proposed beneficiaries on the theory that the grantee or devisee otherwise will be unjustly enriched *at their expense,* unless we at least tacitly assume that these beneficiaries have been deprived of something to which they were in some way or other entitled—which is, of course, to assume just what we are trying to establish. Nevertheless, as stated, in the third group of cases the authorities (outside of Washington) are very nearly unanimous in imposing a so-called "constructive" trust on behalf of the intended beneficiary. A typical argument is that of Cardozo, J., in a recent decision in New York.

"The principle is now a settled one in this state that where a devise is induced by the promise, express or implied, of the devisee, to devote the gift to a lawful purpose, a secret trust is created; and equity will compel him to apply the property in accordance with the promise by force of which he procured it. . . . A court of equity in such cases exerts its power, not merely because there has been a breach of contract, but because the promise has been used as an instrument to induce the promisee to part with his property, so that the retention of it by the promisor in violation of the promise would result in an unjust

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[4] The opinions of the courts are not as a rule very clear as to the real basis for this doctrine, and many apparently believe it to be purely anomalous. Typical cases are: *Linkemann v. Knepper* (1907) 226 Ill. 473, 80 N. E. 1009; *Campbell v. Dearborn* (1872) 109 Mass. 130.

[5] *Lantry v. Lantry* (1869) 51 Ill. 458. Some authorities are contra, *e. g., Fox v. Fox* (1906) 77 Neb. 601, 110 N. W. 304. For other authorities in accord and contra, see the note in 39 L. R. A. (N. S.) 906; also 12 MICH. L. REV. 442, notes 27 and 28. In *Ahrens v. Jones* (1902) 169 N. Y. 555, 62 N. E. 666, the grantor executed the conveyance while on his death bed and the court enforced the oral trust, apparently assimilating the case to those in group three.

[6] *Riordan v. Bannon* (1871) Ir. Rep. 10 Eq. 469; *Curdy v. Berton* (1889) 79 Cal. 420, 21 Pac. 858. For other authorities in accord see the note in 39 L. R. A. (N. S.) 906.

enrichment and would constitute a fraud. It is not the promise only, nor the breach only, but the promise and the breach combined with the extortion of property from the owner upon the faith of the engagement, which puts the court in motion."[7]

Undoubtedly decisions of this kind appeal to our sympathy, for the only alternative is to impose a constructive trust for the heir of the testator, who in many cases turns out to be identical with the devisee, and who, in any event, is not likely to carry out the testator's wishes. It is, however, difficult to reconcile them with the plain language of the statutes, and it is equally hard to see why, if we are to be consistent, the same result must not be reached where the land is transferred by deed instead of by will.[8]

It has indeed been suggested that in the second and third groups a distinction should be drawn between the mere breach of an oral agreement made in good faith and the obtaining of the gift by means of a promise made in bad faith, *i. e.*, one made with no intention to perform and for the purpose of obtaining the property. This distinction has, to some extent, been followed in the American authorities dealing with transfers *inter vivos* on oral trusts for third persons,[9] but not where the gift is by will. If the statutes of frauds and wills are to be enforced in letter and in spirit, even in the case of bad faith referred to, it seems questionable whether anything more than damages for a tort should be given to the proposed beneficiary. That in a suitable case a tort liability in damages should be recognized for diverting from the plaintiff property which would otherwise have come to him by inheritance or devise, seems clear. See (1917) 27 YALE LAW JOURNAL, 263. To create for the proposed beneficiary an equitable interest in the property, however, under pretence of giving specific reparation for a tort, seems in essence to be nothing more than the enforcement of the oral trust which is forbidden by the statutes. For this reason the decision of the Washington court in the principal case, opposed as it is to the general current of the authorities, seems to be based on sound principles. It is to be hoped, however, that the Washington court, and the American courts in

[7] *Golland v. Golland* (1914, Sup. Ct.) 84 Misc. Rep. 299; 147 N. Y. Supp. 263, 267.

[8] Professor George P. Costigan, Jr., in his exhaustive treatment of the whole subject in 28 HARV. L. REV. 237, 28 *ibid.* 366, argues (p. 266) that the courts should recognize a constructive trust in both cases. See also the same author's discussion in 12 MICH. L. REV. 427, 12 *ibid.* 514.

[9] *Crossman v. Keister* (1906) 221 Ill. 69, 79 N. E. 58. This distinction was approved by the late Professor James Barr Ames. See his essay upon Constructive Trusts Based upon the Breach of an Express Oral Trust of Land, in his *Lectures on Legal History*, 425, 430. The same result is reached where the conveyance is solicited, or where there is a violation of some "special confidential relationship." The authorities are collected by Professor Costigan in 12 MICH. L. REV. 442, and note 29.

general, will ultimately come to recognize and enforce a constructive trust on behalf of a grantor who has conveyed on an oral trust for himself.

IMMUNITIES OF DIPLOMATIC OFFICERS

A recent English case, *Re Suarez* (1917, Ch. D.) 117 L. T. 239, again emphasizes the privileged position with respect to judicial process held by diplomatic officers of foreign governments accredited to England. In that case the Bolivian Minister to Great Britain acted unofficially as administrator of the estate of a fellow-national. There being a balance due on his account as such administrator, the plaintiff, as beneficiary of the estate, sought to have a writ of sequestration issued against property of the defendant which was not necessary to maintain his personal comfort or dignity as Minister. Although the Minister had waived his diplomatic immunity from suit, the Court held that no writ of execution could issue against any of his property, in view of the Diplomatic Privileges Act[1] which declared null and void all writs and processes sued out against the person or property of public Ministers.

The immunities of diplomatic officers are extended to them in their official character of state agents and are enjoyed by them as representatives of their sovereigns. The immunity from civil process belongs technically to the Minister's State and does not vest in him personally, and it has been held that, in principle, a diplomatic officer is incompetent to waive it.[2] The immunities mentioned extend to his family and to the members of his official household.[3] Nor do these expire, according to the better opinion, with the cessation of his functions; but they are retained for a reasonable time after he has presented his letters of recall.[4] It seems also that an ambassador is immune from arrest on civil process while traveling through a third state to which he is not accredited.[5] Some of the customary diplomatic immunities, particularly the immunity from judicial process, have in many countries found legislative expression in municipal statutes.[6]

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[1] Act of 1708 (7 Anne c. 12).

[2] *United States v. Benner* (1830, U. S. C. C. Pa.) 1 Baldwin 234.

[3] *Lockwood v. Coysgarne* (1765, K. B.) 3 Burr. 1676; *Respublica v. DeLongchamps* (1784, Pa. O. & T.) 1 Dall. 111.

[4] *D'Azambuja v. Pereira* (1830, U. S. D. C. Pa.) 1 Miles 366; *Contra, Marshall v. Critico* (1808, K. B.) 9 East 447.

[5] *Holbrook v. Henderson* (1851, N. Y. Super.) 4 Sandf. 619; *Wilson v. Blanco* (1889) 56 N. Y. Super. 582 and criticism of this case in 1 Westlake, *Int. Law*, 265-266.

[6] In the United States, secs. 4063-4064 of the Revised Statutes. In Great Britain, the Act of 1708 (7 Anne c. 12) applied in the principal case. See also, for foreign legislation, Odier, *Des privileges des agents diplomatiques*, 53-78.

While, in principle, the immunity from judicial process cannot be waived by a Minister, at least without the consent of his government, exceptions have been introduced in various classes of cases in which the Minister has acted in his personal and unofficial character. The most usual cases of this kind arise in civil law countries where the Minister has engaged in trade or commerce, or where he has contracted obligations in a fiduciary capacity as guardian, administrator or trustee.[7] An exception is also made in cases involving local real property held by the Minister as a private individual. By the United States Instructions to Diplomatic Officers[8] this immunity is narrowed still further by a provision that not only real, but also "personal property, aside from that which pertains to him as a Minister, . . . is subject to the local laws."

The broad provisions of the British Statute of 7 Anne c. 12 extends the immunity of foreign envoys from compulsory civil jurisdiction even to cases arising out of commercial transactions in which they may have engaged.[9] And even in cases where by reason of his voluntary submission jurisdiction is assumed, as in the principal case, the court's process by way of execution or sequestration will not, by virtue of the above mentioned Statute extend to any of his property, whether necessary to his official character or owned by him solely as a private individual.[10] Thus, it would seem that in England and probably in the United States, where the liberal provisions of the statute of 7 Anne have been substantially adopted,[11] the property of foreign diplomatic envoys, official or private, is exempt from seizure on execution.

UNCONSTITUTIONALITY OF SEGREGATION ORDINANCES

The constitutional aspects of race conflict problems are again brought up by *Buchanan v. Warley* (1917) 38 Sup. Ct. 16.[1] Overruling the Court of Appeals of Kentucky, the Federal Supreme Court held a Louisville segregation ordinance unconstitutional, as depriving citizens of property without due process of law. "In effect, premises situated . . . in the so-called white block are effectively debarred from sale to persons of color, because if sold they cannot be occupied by the purchaser nor by him sold to another of the same color."[2]

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[7] See Hershey, *Essentials of Int. Pub. Law*, 289.

[8] (1897) Sec. 47, p. 19, 4 Moore's *Digest of Int. Law*, 646.

[9] *Magdalena Steam Navigation Co. v. Martin* (1859, Q. B.) 2 El. & El. 94; 1 Oppenheim, *Int. Law* (2d ed.) 465.

[10] See *Taylor v. Best* (1854) 14 C. B. 487; Snow, *Cases on Int. Law*, 90.

[11] U. S. Rev. St. Secs. 4063-64.

[1] s. c. below (1915) 165 Ky. 559, 177 S. W. 472; see (1915) 25 YALE LAW JOURNAL 81.

[2] The ordinance classified the blocks on the basis of the relative number of residences, places of abode, and places of public assembly occupied in each block

The line of cases culminating in *Buchanan v. Warley* gave a new twist to race conflict problems. Hitherto the decisions on such questions have turned on the point of discrimination. So, for example, with the establishment of a negro's right to be tried before a jury from which men of his own race have not been, as such, excluded, whether the exclusion be by legislation,[3] or by discrimination in administering a statute fair on its face.[4] So, too, with the fruitless attacks on statutes requiring "separate and equal accommodation" for the two races in schools[5] and in public conveyances.[6] The Supreme Court was, however, ready to find such discrimination when a statute authorized sleepers and diners to be provided for white persons without corresponding accommodations for colored persons—however slight might be the demand from the latter class.[7] Legislation forbidding intermarriage between persons of white and black blood,[8] or laying severe penalties on fornication and adultery where the offenders were of different race,[9] was attacked on similar grounds, but was upheld. Discrimination, finally,—deprivation of rights and liberties *because of* race, color, or previous condition of servitude—is the issue on which the disenfranchisement cases have sought a square decision, with varying results.[10]

But in the principal case the plaintiff was a white man, a landowner, seeking to enforce against a negro a contract for the sale of land made subject to the purchaser's liberty under the law to occupy the premises, which liberty the Louisville ordinance would destroy. All the segregation legislation, indeed, since the original Baltimore ordinance in 1911, has been carefully drawn to avoid any question of discrimination by applying to whites and blacks alike.[11] But the earlier ordinances were found to exceed the police power as being in some respects unreasonable in their provisions. North Carolina found one out of keeping

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by the different races. This discussion follows the court in speaking only of "residences" to include all the above.

It is to be noted that the last phrase in the passage quoted must mean "sold so as to convey the privilege of occupancy."

[3] *Strauder v. West Virginia* (1879) 100 U. S. 303.

[4] *Ex parte Virginia* (1879) 100 U. S. 339.

[5] *Roberts v. City of Boston* (1849, Mass.) 5 Cush. 198; *People v. Gallagher* (1883) 93 N. Y. 438; and see, as to private schools, *Berea College v. Commonwealth* (1906) 123 Ky. 209, 94 S. W. 623.

[6] *Plessy v. Ferguson* (1896) 163 U. S. 537, 16 Sup. Ct. 1138.

[7] *McCabe v. Atchison etc. R. Co.* (1914) 235 U. S. 151, 35 Sup. Ct. 69.

[8] *State v. Gibson* (1871) 36 Ind. 389, cited and approved, *Plessy v. Ferguson, supra,* 545; and see *Keen v. Keen* (1904) 184 Mo. 358, 83 S. W. 526.

[9] *Pace v. Alabama* (1882) 106 U. S. 583, 1 Sup. Ct. 637.

[10] *Cf. Anderson v. Myers* (1910, C. C. Md.) 182 Fed. 223, with *Atwater v. Hassett* (1910) 27 Okla. 292, 111 Pac. 802. On this question of disenfranchisement see Julien C. Monnet (1912) 26 HARV. L. REV. 42.

[11] *Cf. State v. Gurry* (1913) 121 Md. 534, 546, 88 Atl. 546, 551.

with the public policy of the state.[12] Even where they were welcomed as useful and desirable for the purpose of reducing race friction and promoting race purity in congested city districts, the courts found one fault in them fatal: they did not respect the full property rights existing at the date of passage.[13] Though a man already had the legal privilege of residing on certain land, his privilege was cut away if the land lay in an area forbidden to his race, and he had not yet moved in. It may be questioned how far this legislative deprivation of privilege is more stringent than the concededly valid denial to liverymen[14] or liquor dealers[15] of the use of their premises in certain districts for the only purpose for which they bought. Be that as it may, the ordinance in the present case was drawn to avoid that difficulty: it was expressly left free to anyone to exercise whatever privilege of residence, etc., he possessed at the time of enactment.[16]

Invalidity in the principal case, then, arises not out of denial of user to present owners, but out of restriction of the power of alienation. Alienation is the extinguishment in the present owner of all the legal relations which go to make up ownership, and the creation of a full new set of corresponding relations in the new owner.[17] If the power to alienate the legal interest in certain premises includes the power to create in another just such legal relations with regard to those premises as the alienor himself enjoys, it is clear that the ordinance in question does seek to cut down that power. Where the land lies, *e. g.*, in a "white block," the owner himself has the privilege of occupancy; he can extinguish his own privilege by selling to a negro, but he can no longer create a corresponding privilege in a negro vendee.

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[12] *State v. Darnell* (1914) 166 N. C. 300, 81 S. E. 338.

[13] *State v. Gurry, supra; Carey v. City of Atlanta* (1915) 143 Ga. 192, 84 S. E. 456. In *Coleman v. Town of Ashland* (1915) 117 Va. 692, 86 S. E. 139, the court drew this same distinction, declared the ordinance invalid as to rights, etc., existing prior to its passage, but upheld it as to those accruing subsequently.

For a more drastic attempt at segregation, requiring even established residences in the forbidden district to be vacated, see *In Re Lee Sing* (1890 C. C. N. D. Cal.) 43 Fed. 359. And see note 16.

[14] *Cf.* the principal case, p. 18.

[15] *State v. Ball* (1909) 19 N. D. 782, 123 N. W. 826.

[16] After the Louisville ordinance had been held valid (see note 1) Atlanta tried again, borrowing the Louisville text; this time the Georgia court upheld the ordinance. *Harden v. City of Atlanta* (1917, Ga.) 93 S. E. 401. It was distinguished from that in the *Carey* case, *supra,* as not disturbing rights already vested. The present discussion seeks to show that such a distinction is misleading, vested rights, etc., being disturbed in any such case. But there might be tenable ground for differentiation in the varying value of the landowner's loss under one or the other form of ordinance. See note 22, *infra.*

[17] So in the case of simple bargain and sale; the new relations differ somewhat, even in their sum, from the old, where the new estate is divided—for example, a life estate with remainder over.

But may it not be doubted whether this cuts down the owner's market for unimproved real estate further than would a fire regulation forbidding the erection in a certain district of any but stone houses?[18] None would then be able to buy for residence purposes but those whose cash or credit was sufficient for a stone house; the governmental action would "effectively debar sale" to persons whose pocketbook lacked a certain fatness. And the question which the court finds presented in the instant case would be rephrased: "May the occupancy, and, necessarily, the purchase and sale of which occupancy is an incident, be inhibited by the states, or by one of their municipalities, solely because of the *financial standing* of the proposed occupant of the premises?"[19] Undoubtedly, yes, where public policy demands; yes, as well, where the sole objection is the proposed occupant's actual or proposed business. Nor is it clear that the evils from intermingling of the races in crowded residence sections are less than those arising from the liquor traffic, nor of less importance to the public.

Neither does the power by contract of sale to create each of the property relations in a person of another race seem more sacred and immutable[20] than that other power which a statute may destroy: the

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[18] *Cf. First Natl. Bk. v. Sarlls* (1891) 129 Ind. 201, 28 N. E. 434.

[19] "Solely because of the color," the opinion reads, p. 18. This phrasing of the question does not fairly present the question involved in the case. It stresses—or over-stresses—one of the conflicting interests, that of the property owner, but opposes to it not the community interests it must be weighed against, but the proposed yardstick of classification. Yet the justification for such legislation lies not in the fact of one man's color or financial inability, but in the interest of the public to keep down the danger of fire, or of amalgamation, on the one hand, and race friction, on the other. Any yardstick reasonably suited to the purpose should be held good, as it has been in the school cases.

It is submitted that underlying the illogic of the court's question and whole opinion there is an inchoate sense of rebellion against extending such exercise of the police power as practically confiscates much of the value of a man's property. The legality of such exercise is indeed established by the cases; but would not some proceeding in the nature of eminent domain better satisfy our present idea of justice?

[20] Compare the language in *State v. Darnell, supra,* quoted in *Carey v. City of Atlanta, supra,* 200, with that of Justice Lumpkin's admirable special concurrence, *ibid.* 202. Rights, etc., cannot be immutable or absolute. They are creations of society, exist only where and while society exists, and change with society's changing complexion. Even so-called natural rights are merely those, counterparts of which are conferred by most of the societal groups known to us. If, therefore, the community sense ever insistently demands, for instance, a certain restriction of the power to alienate residences, sooner or later that restriction will force its way into the law. *Cf.* Prof. Arthur L. Corbin, *The Law and the Judges* (1914, Jan.) YALE REVIEW. It will be noted that *Harden v. City of Atlanta, supra,* brings the Georgia court substantially into the position marked out previously by Lumpkin, J.

power by marriage contract to create in oneself and a person of another race the whole of the complex relations of marriage.[21]

Where a segregation ordinance is drawn, then, to apply similarly to members of both races, and where public policy justifies its passage,[22] analogy would seem to show that no undue strain on the police power is required to sustain such restriction of rights, privileges, and powers as is occasioned by the ordinance. The more certainly would it seem that Kentucky and Virginia were sound in upholding such legislation where it cut off only privileges of occupancy accruing after enactment. None the less the decision in the principal case is, unfortunately, conclusive that for the time being the interests of the public in race segregation are in law outweighed by those of landowners whose power of alienation segregation would restrict; city residence districts must still be tailored in pepper-and-salt, and not in checks.

STATE VERSUS FEDERAL RULES AS TO PRICE RESTRICTIONS

A recent decision by the court of chancery of New Jersey presents a novel aspect of the much-discussed subject of price-fixing agreements as restraints of trade. A statute of that state[1] prohibits, among other acts discriminatory against the good will of another's business, price inducements extended by dealers in violation of the terms of printed notices accompanying the goods from the hands of the manufacturer. In the principal case watches manufactured in New York were sold to jobbers in New Jersey, each watch bearing a notice as to its retail

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[21] Some cases go so far as to hold an inter-race marriage invalid, although it was good by the *lex loci celebrationis*. So *State v. Tutty* (1890, C. C. S. D. Ga.) 41 Fed. 753.

[22] Here, in the present state of the law, is the real crux in police power cases. The interests of him who suffers must be balanced against those of his neighbors and those of the public at large. The up-shot of the balancing will show the ordinance reasonable or unreasonable; distinguishing segregation in crowded centers, for instance, from that in thinly peopled country. Even then, previous decisions—whose *dicta* are cited to support this!—show that the unreasonableness must be flatfooted to justify action by the court. *Booth v. Illinois* (1902) 184 U. S. 425, 22 Sup. Ct. 425. For a criticism of the principal case on similar grounds, see (1917) 16 MICH. L. REV. 109.

[1] "It shall be unlawful for any merchant, firm, or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation, or good-will of any maker in whose product said merchant, firm, or corporation deals, or to discriminate against the same by depreciating the value of such products in the public mind, or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in cases where said goods do not carry any notice prohibiting such practice and excepting in case of a receiver's sale, or a sale by a concern going out of business." N. J. Laws of 1916, c. 1907.

price. The defendant was a retail dealer who acquired the watches from the jobbers. It was held that the manufacturer was entitled to an injunction against a violation by the defendant of the terms of the price-fixing notice. *R. H. Ingersoll & Bro. v. Hahne & Co.*, 101 Atl. (N. J.) 1030.

In upholding the statute and construing it as applying to the fixing of wholesale and retail prices by the manufacturer, the court vigorously challenged the doctrine of the federal Supreme Court in the *Dr. Miles Medical Co.* case[2] that such price-fixing arrangements by contract are in unlawful restraint of trade at common law. The merits of this controversy do not primarily concern us.[3]

A more serious question for our purpose is whether this controversy was open to the New Jersey court or to the New Jersey legislature. The court unquestionably regarded its decision as in conflict with those of the Supreme Court of the United States on the common law

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[2] *Dr. Miles Medical Co. v. Park & Sons* (1911) 220 U. S. 373, 31 Sup. Ct. 376; *Bauer v. O'Donnell* (1913) 229 U. S. 1, 33 Sup. Ct. 616; *Motion Picture Patent Co. v. Univ. Film Co.* (1917) 243 U. S. 502, 37 Sup. Ct. 416; *Straus v. Victor Talking Machine Co.* (1917) 243 U. S. 490, 37 Sup. Ct. 412; (see on the last two cases, COMMENT in (1917) 26 YALE LAW JOURNAL 600); *Ford Motor Co. v. Union Motor Sales Co.* (1917, C. C. A. 6th) 244 Fed. 156. See also "Price Restriction on the Resale of Chattels," by William J. Shroder, 25 HARV. LAW REV. 59.

[3] For the arguments in favor of the validity of such agreements see the principal case; *Dr. Miles Medical Co. v. Park & Sons, supra* (dissenting opinion of Holmes, J.); *Garst v. Harris* (1900) 177 Mass. 72, 58 N. E. 174; *Fisher Flouring Mills Co. v. Swanson* (1913) 76 Wash. 649, 137 Pac. 144; *Walsh v. Dwight* (1899, N. Y.) 40 App. Div. 513, 58 N. Y. Supp. 91; *Com. v. Grinstead* (1901) 111 Ky. 203, 63 S. W. 427; *Elliman & Sons Co. v. Carrington & Sons* [1901] 2 Ch. 275; *Nat. Phonograph Co. v. Edison-Bell Consol. Phonograph Co.* (C. A.) [1908] 1 Ch. 335. See also *Grogan v. Chaffee* (1909) 156 Cal. 611, 105 Pac. 745, and *Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 355, 128 Pac. 1041.

It is submitted that the decisions which ignore the arguments in favor of the validity of such agreements mark a reversion to an old condition of rigid rules governing this subject prior to the decision of *Nordenfelt v. Nordenfelt Co.* (H. L.) [1894] A. C. 535, and in particular that the reasoning which limits the protection of good will to the case of a purchase of an established business is an artificial deduction from the incidental fact that the general doctrine of restraints of trade happened to reach its maturity with respect to this class of cases. See, for example, opinion of Hughes, J., in *Dr. Miles Medical Co. v. Park & Sons, supra*, and article in 25 HARV. LAW REV. 59, *supra*. No reason exists for assuming the classification by Taft, J., in *U. S. v. Addyston Pipe & Steel Co.* (1898, C. C. A. 6th) 85 Fed. 271, 282, to be exhaustive. The nature of the subject is such as to preclude the possibility of an exhaustive classification.

For the "rule of reason" as applied generally, see also *Central Shade Roller Co. v. Cushman* (1887) 143 Mass. 353, 9 N. E. 629; *Meyer v. Estes* (1895) 164 Mass. 457, 464, 41 N. E. 683; *United Shoe Machinery Co. v. Kimball* (1907) 193 Mass. 351, 79 N. E. 790; *Leslie v. Lorillard* (1888) 110 N. Y. 519, 18 N. E. 363.

issue involved.[4] No attempt was made, or could be made, to distinguish the case in favor of the validity of the contract, as such, under the federal decisions. No pretense of an actual agency between the parties existed as in the recent case of *Ford Motor Co. v. Boone, Inc.*[5] The relation of the parties, if contractual at all, was not more clearly so than in the *Dr. Miles Medical Co.* case. The fact, mentioned in the opinion, that the goods were unpatented, manifestly could not help the case in favor of validity.[6] In a few brief sentences the question was dismissed as to whether the statute of the state was inconsistent with, and therefore overridden by, the Sherman Law.[7]

This decision could not have been based on the ground that such contract as there may have been did not relate to interstate commerce. The price-fixing scheme, if it was such, affected shipments across state lines as clearly as did those in the *Dr. Miles Medical Co.* case. Yet the last named authority, while not bringing into prominence the Sherman Act, expressly bases its decision in part upon a determination of what was prohibited by that statute.[8] This leaves open no sliding scale of legality dependent upon the diverging local rules of reasonableness. The sole question is, therefore, can a state legislature command the performance of certain acts which the federal laws have forbidden the parties to contract, or combine, or conspire to do?

If this were an attempt by a state to validate a contract rendered invalid by federal legislation, the answer would be too obvious for discussion. Such contracts are past all question subject to the interstate commerce power. That power has been exercised by Congress. No more directly incompatible legislation could be conceived than an attempt by a state to impose a new and inconsistent rule of validity applicable to interstate and intrastate contracts alike.[9]

Can the legislature, however, interpose after the goods have reached the New Jersey dealer, and become mingled with the general mass of commodities subject to local jurisdiction,[10] and then compel the performance of the very acts which the parties could not have contracted to do, this coercion operating not by way of the enforcement of a contractual obligation, but by the creation of a new, independent, non-contractual, statutory duty—a rule of conduct merely, to which the

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[4] See principal case, p. 1031.

[5] (1917, C. C. A. 9th) 244 Fed. 335.

[6] See opinions in *Motion Picture Patent Co. v. Univ. Film Co.* and *Straus v. Victor Talking Machine Co., supra.*

[7] See principal case, p. 1032.

[8] See *Dr. Miles etc. Co. v. Park & Sons, supra,* 409.

[9] *Gibbons v. Ogden* (1824, U. S.) 9 Wheat. 1; *Co. of Mobile v. Kimball* (1880) 102 U. S. 691; *Wisconsin v. Duluth* (1877) 96 U. S. 379; *Manchester v. Mass.* (1891) 139 U. S. 240, 11 Sup. Ct. 559.

[10] See *Brown v. Maryland* (1827, U. S.) 12 Wheat. 419 and *Crowley v. Christensen* (1890) 137 U. S. 86, 11 Sup. Ct. 13.

domestic dealers must submit as well as to all other regulations against infringements of the trade rights of others?

We must carefully differentiate two distinct lines of decisions. Numerous cases have accorded to the states the power to exercise certain police functions affecting interstate commerce incidentally and only measurably, and operating only when the acts of Congress are silent.[11] Such are the pilotage cases,[12] the quarantine cases,[13] and those involving intrastate carriers constituting parts of a larger interstate nexus of transportation.[14] In these cases the failure of Congress to legislate and the moderate degree of the interference are both important criteria of the constitutionality of the state legislation.

But another important class of cases exists where no such limitation of degree is recognized with respect to the state power, and where the presence or absence of congressional legislation of a contradictory purpose is of no importance. Such are the decisions giving to the states the full power to prohibit the sale of intoxicating liquors after removal from the original package, although the effect of such exercise of power is to render valueless a privilege of importation guaranteed against state interference.[15] Similar instances are those of state powers of taxation of imported goods after they have lost the character of imports,[16] or the power to tax[17] or prohibit[18] the manufacture of an article intended for transportation in interstate commerce. The examples could be multiplied hypothetically.[19] Not merely has the state these powers, but no one would seriously ascribe to Congress, under the interstate commerce clause, the power to take them away by legislation. Moreover, the extent to which the legislation may interfere with a purpose of the interstate commerce power is an irrelevant inquiry. The single decisive question is, has the interstate transaction begun, or if begun has it terminated, at the time that the police power of the state attempts the exercise of its function?

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[11] *Wilson v. Black Bird Creek Marsh Co.* (1829, U. S.) 2 Pet. 245; *Cooley v. Board of Wardens* (1851, U. S.) 12 How. 299; *New York v. Miln* (1837, U. S.) 11 Pet. 102; *Gilman v. Philadelphia* (1865, U. S.) 3 Wall. 713, 727; *Escanaba Co. v. Chicago* (1882) 107 U. S. 678, 2 Sup. Ct. 185.

[12] *Cooley v. Board of Wardens, supra.*

[13] *Morgan v. Louisiana* (1886) 118 U. S. 455, 465, 6 Sup. Ct. 1114.

[14] *Chicago, etc. Ry. v. Iowa* (1876) 94 U. S. 155.

[15] *Crowley v. Christensen, supra.*

[16] *Brown v. Maryland, supra.*

[17] *Coe v. Errol* (1886) 116 U. S. 517, 6 Sup. Ct. 475; *Diamond Match Co. v. Ontonagon* (1903) 188 U. S. 82, 23 Sup. Ct. 266; *U. S. v. Knight Co.* (1895) 156 U. S. 1, 15 Sup. Ct. 249.

[18] *Bartemeyer v. Iowa* (1873, U. S.) 18 Wall. 129; *Kidd v. Pearson* (1888) 128 U. S. 1, 9 Sup. Ct. 6.

[19] Thus Congress has complete control of the subjects of immigration. *Henderson v. New York* (1875) 92 U. S. 259. Yet no one would deny to the state the exclusive power to legislate respecting the civil rights of aliens to a degree rendering the Congressional policy abortive within the state jurisdiction.

Obviously the principal case, if upheld, must fall in this the latter class of decisions. The protection of the good will of an established business is incontestably a legitimate object of the exercise of the police power of a state, yet its exercise in this instance approaches in effect the actual undoing of the positive dispositions of Congress. Has the interstate transaction ended at the time that the act of New Jersey comes into application? The conduct of the wholesale and retail dealers after the receipt of the manufactured product, is, taken by itself, plainly outside the sphere of interstate commerce in its most liberal sense. Not merely had Congress not enacted that they should not observe the terms of the accompanying notices but it undoubtedly could not impose such a restriction upon intrastate commercial conduct. It is, as we have seen, no novelty to the law that this limitation of power may sometimes render the purposes of federal legislation liable to be defeated by state legislation intervening after the subject-matter has passed from federal control.

But other difficulties remain. If, for example, the contract as such is void under the federal law, but the printed notice may be effectual under the state law to accomplish the purpose of the manufacturer or producer, is the act of sending the notices itself a violation of federal law? Is an intention to contract or combine or conspire to accomplish his purpose necessarily presupposed in an attempt to avail himself of the rights accorded by the law of the state? Does the party who buys goods accompanied by the printed notice participate by virtue of that act in an illegal combination? To answer these questions affirmatively would be tantamount to an admission that the price-fixing combination or conspiracy which is in its totality an interstate transaction is not completed until its purpose is effected, and that state legislation intervening prior to this point of time is void.[20] But is not the intention to contract or combine in a price-fixing scheme quite distinct from the intention to avail oneself of the non-contract right or to subject oneself to the non-contract duty created by the statute of a state requiring observance of the terms of a price-fixing notice, and may not the latter exist entirely apart from the former, however difficult of determination the question of fact may be? It is submitted that this situation of fact is entirely possible, and, if it exists, the right and duty created by state law are in no true sense a part of an antecedent combination or conspiracy, that the interstate transaction is, from every possible viewpoint, closed, and that the state is, from that point forth, sole judge of its commercial policy.

The inconsistency in purpose in this case, however, must not be exaggerated. Prohibitions of restraints of trade, common law or statutory, do not decree that restraints of trade shall not exist but that

[20] *Swift & Co. v. U. S.* (1905) 196 U. S. 375, 25 Sup. Ct. 276; *Northern Securities Co. v. U. S.* (1904) 193 U. S. 197, 338, 24 Sup. Ct. 436.

individuals by their private acts, pursuant to their own judgments of business expediency, shall not have the power to create them. A state statute enacting a new and compulsory standard of trade morality, in itself creating what from the standpoint of federal law is a restraint of trade, does not, except in its ulterior aspects, contravene or frustrate their purpose.

It may be urged that a recognition of this state power concedes an unlimited opportunity to frustrate interstate commerce legislation, or in particular legislation against restraints of trade. If a state can, pursuant to the domestic policy of protecting business good will, require the performance of acts which federal legislation was intended, not to forbid, but to prevent, can it also resolve upon a policy requiring the performance of all acts which parties have contracted, though in violation of federal law, to perform? Such an inquiry ignores the essential distinction between a domestic policy which incidentally frustrates a purpose of the interstate commerce power, and a domestic policy which consists merely in the frustration of such purposes. The latter might well be held not to be an exercise of the police power at all. The present statute, however, has a purpose clearly bringing it within the former class.

We conclude, therefore, that the decision in the principal case is correct, both with respect to the rule of policy enunciated, and with respect to the power of the state to establish that policy.

C. R. W.